CORRECTED COPY

No. 85-1695

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE AND
SOCIÉTÉ DE CONSTRUCTION D'AVIONS DE TOURISME,
Petitioners,
VS.
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.
(DENNIS JONES, JOHN AND ROSA GEORGE,
REAL FARTIES IN INTEREST)

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Is the Hague Evidence Convention[1] applicable to the discovery of documentary evidence and information located abroad from a foreign national over whom a U.S. court has personal jurisdiction?

2. Where the Hague Evidence Convention applies, does treating its procedures as merely optional frustrate its purpose?

3. Where the Hague Evidence Convention applies, does a particularized analysis of comity considerations generally require courts to make use of its procedures?

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[1]Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974).

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BRIEF FOR PETITIONERS

Petitioners Société Nationale Industrielle Aérospatiale ("SNIAS") and Société de Construction d'Avions de Tourisme ("SOCATA") respectfully submit this brief on the merits.[2]

[2]In response to Rule 28.1, Petitioners state the following: Petitioner Société de Construction d'Avions de Tourisme is a wholly-owned subsidiary of Petitioner Société Nationale Industrielle Aérospatiale. Petitioners have no other affiliates or subsidiaries which are not wholly-owned.

In addition to the parties shown in the caption, Seed & Grain Construction Co. is a party in the district court proceedings. It did not participate in the writ proceedings before the Eighth Circuit nor has it appeared in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals, reported at 782 F.2d 120 (8th Cir. 1986), is reprinted in the appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a. The order of the magistrate, which is unreported, is reprinted there at 11a.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1986. The petition for a writ of certiorari was filed on April 16, 1986 and was granted on June 9, 1986. The Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

This case concerns the construction and purpose of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974) ("Hague Evidence Convention" or "Convention") and the interplay between the Hague Evidence Convention, the Federal Rules of Civil Procedure, and French Penal Code Law No. 80-538. The Hague Evidence Convention is reproduced at Pet. App. 26a. Rules 33, 34 and 36 of the Federal Rules of Civil Procedure are reproduced at Pet. App. 42a. French Penal Code Law No. 80-538 ("French Blocking Statute") and an official translation thereof are reproduced at Pet. App. 47a.

STATEMENT

Petitioners are corporations based in France presently defending two related products liability actions in a federal district court. When presented with demands for documents and information available only from sources in France, petitioners informed plaintiffs that such requests must be made through the procedures of the Hague Evidence Convention. Plaintiffs did not attempt to use the Convention's procedures but instead persisted in their discovery demands under the federal rules. Petitioners then sought a

protective order to require plaintiffs' compliance with the terms of the treaty. The magistrate denied the motion, and the court below affirmed on the mistaken belief that the Convention does not apply to production of the evidence here in question. 782 F.2d at 124, Pet. App. 4a.

The Hague Evidence Convention. The Convention is a multilateral treaty which provides methods for litigants in civil and commercial disputes to obtain evidence from abroad. It is intended to help lessen the procedural obstacles encountered when litigants seek evidence located in a foreign country having a legal system different from our own and, in particular, to bridge the significant differences between the common law and civil law approaches to the gathering of evidence.[3] There are at present seventeen parties to the Convention including the United States and France.[4]

1. The Convention is a product of the Hague Conference on Private International Law, an association of sovereign nations whose purpose is to "work for the progressive unification of the rules of private international law."[5] It is based on the principle

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[3]*See S.* Exec. A, 92d Cong., 2d Sess. VI (1972) (hereinafter cited as *Convention Transmittal*); S. Exec. Rep. No. 25, 92nd Cong., 2d Sess. 1 (1972) (hereinafter cited as *Senate Foreign Relations Committee Report); Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law, reprinted in* 8 Int'l Legal Materials 785, 806 (1969) (hereinafter cited as *1969 U.S. Hague Delegation Report);* Amram, *Report on the Eleventh Session of the Hague Conference on Private International Law,* 63 Am. J. Int'l L. 521 526 (1969).

[4]Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Israel, Italy, Luxenbourg, the Netherlands, Norway, Portugal, Singapore, Sweden, United Kingdom and the United States. VII *Martindale-Hubbell Law Directory,* Part VII at 14-15 (1986) (hereinafter cited as *Martindale-Hubbell).*

[5]Statute of the Hague Conference on Private International Law, art. 1, *opened for signature,* October 31, 1951, 15 U.S.T. 2228, T.I.A.S. No. 5710, 220 U.N.T.S. 121 (entered into force for the United States October 15, 1964).

that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." *Convention Transmittal* at 11. Twenty-five nations participated in the Convention's drafting; the great majority of these participants, and of the current parties, are civil law nations.

In civil law nations, including France, fact-gathering is a judicially controlled process in which the ability of litigants to fish for potentially relevant information is much more carefully circumscribed than in U.S. courts. The court, rather than the parties' lawyers, takes the main responsibility for gathering and

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Mutual judicial assistance has been a major focus of the Hague Conference since its inception. At the Second Conference, held in 1894, the first multilateral convention on civil procedure was drafted. It included detailed rules regarding the execution of requests for judicial assistance. This first convention was superseded by the 1905 Civil Procedure Convention, which ultimately was adopted by 15 European nations and remained in force for many of the parties for over 50 years. In 1954, the Conference adopted a revised and modernized version of the earlier convention. The 1954 Convention addresses three topics: service of process; taking of evidence; and legal aid. The 1954 Convention was ultimately adopted by some 28 states and continues in force between some of them.

The United States was not a party to either of these earlier conventions and did not participate in their drafting. In 1963, at the urging of the Executive Branch, Congress passed and the President signed a Joint Resolution authorizing the United States to participate in the Hague Conference. The United States first participated as a full member at the Conference's Tenth Session in October 1964. The Tenth Session resulted in the adoption of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *done at the Hague*, November 16, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163. Encouraged by its diplomatic success in achieving consensus upon a service convention, the United States urged consideration of an evidence convention at the next session of the Hague Conference. *See generally* B. Ristau, 1 *International Judicial Assistance (Civil and Commercial)* §§ 1-2 (1984); Nadelmann, *The United States Joins the Hague Conference on Private International Law: A "History" with Comments*, 30 Law & Contemp. Probs. 291 (1965).

sifting evidence. In the civil procedure of these nations, trial is not a single discrete event distinct from pretrial discovery. Instead, the court gathers and evaluates evidence over a series of hearings.[6] Because evidence gathering in civil law nations is a judicial function, these nations generally regard the nonjudicial taking of evidence located in their territory as an affront to their sovereignty. When an American attorney attempts to obtain evidence located in a civil law nation without passing through the foreign nation's courts, the judicial sovereignty of the civil law nation is violated, even if the evidence is offered voluntarily.[7]

The United States was instrumental in the drafting of the Hague Evidence Convention and was its main proponent, seeking to minimize the difficulties U.S. litigants encountered in obtaining evidence located in civil law nations.[8] To accomplish this goal, the United States urged the Hague Conference to undertake revision of Part II of the 1954 Convention Relating to Civil Procedure[9] (which concerns the taking of evidence) in order "to explore the availability of other techniques of obtaining testimony abroad, which overcome some or all of the disadvantages of letters rogatory."[10]

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[6] *See* J. Merryman, *The Civil Law Tradition* 111-19 (2d ed. 1985); J. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 826-35(1985); 1 *New Code of Civil Procedure in France* xxvi-xxxv (F. de Kerstrat & W. Crawford, trans. 1978).

[7] The act of taking evidence from a willing witness in a civil law nation "may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the 'judicial sovereignty' of the host country, unless its authorities participate or give their consent." *1969 U.S. Hague Delegation Report* at 806.

[8] *Senate Foreign Relations Committee Report* at 1-2.

[9] Convention Relating to Civil Procedure, *done at the Hague*, March 1, 1954, 286 U.N.T.S. 265.

[10] Conférence de La Haye de Droit International Privé, *IV Actes et Documents de la Onzième Session, Obtention des Preuves à l'Éntranger* 16 (Bureau Permanent de la Conférence ed. 1970) (hereinafter cited as *Convention History*).

Prior to the Hague Evidence Convention, letters rogatory were the principal means recognized by civil law nations for obtaining evidence located on their soil for use in foreign judicial proceedings.[11] The procedures for preparing and serving such letters were often technically cumbersome, execution could be refused on numerous grounds, and the evidence generated through this process was not always in a form utilizable in the courts of the nation where the request originated.[12]

The Convention liberalizes and simplifies former practices with respect to letters rogatory, which it terms "letters of request," and provides improved means for taking evidence abroad without the direct participation of the foreign judiciary. To further the U.S. objective of minimizing difficulties in obtaining evidence from abroad, article 27 of the Convention "[p]reserve[s] all more favorable and less restrictive practices arising from internal law, internal rules of procedure and bilateral or multilateral conventions."[13]

2. The Convention provides three alternative methods for taking evidence abroad for use in civil or commercial litigation. The first is the letter of request, by which a court of one nation through appropriate channels asks the courts of another to secure designated evidence. Arts. 1-14, Pet. App. 26a-31a. Second, evidence may be taken before a diplomatic or consular officer of the requesting State. Arts. 15-16, Pet. App. 31a-32a. Third, evidence may be taken before any person duly appointed as a commissioner for that purpose. Art. 17, Pet. App. 32a.

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[11] *Convention Transmittal* at VI; Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 Am. J. Int'l L. 104, 105 (1973).

[12] *Memorandum of the United States with Respect to the Revision of Chapter II of the 1954 Convention on Civil Procedure* (hereinafter cited as *U.S. Memorandum*), *reprinted in Convention History* at 15.

[13] *Senate Foreign Relations Committee Report* at 2. The United States makes available "more favorable and less restrictive practices" to foreign litigants pursuant to 28 U.S.C. § 1782, enacted in 1964 as part of Public Law 88-619.

As under prior practice, the letter of request is a principal method of obtaining evidence from a contracting State under the Convention.[14] The signators to the Convention have agreed that letters of request "shall be executed expeditiously" (art. 9, Pet. App. 29a), applying "appropriate measures of compulsion." (art. 10, Pet. App. 29a). To simplify and expedite the procedure, article 3 specifies what a letter of request must contain, and the parties have adopted recommended forms to assist in the preparation of letters.[15]

The Convention liberalizes former practice by requiring the judicial authority which executes a letter of request to defer to a request that a special method or procedure be followed unless such method or procedure is "incompatible" with the internal law of the State of execution or "impossible of performance." Art. 9, Pet. App. 29a. The Conference record makes clear that "incompatible" means more than simply "different" and that these exceptions are to be narrowly construed.[16] This provision is designed to insure that the evidence obtained in response to the letter is utilizable in the requesting State.[17]

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[14] Amram, 67 Am. J. Int'l L. at 105.

[15] *Report on the Work of the Special Commission on the Operation of the Convention of 16 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, June 12-15, 1978, reprinted in* 17 Int'l Legal Materials 1425, 1434-39 (1978) (hereinafter cited as *1978 Report on Convention Operation*); *Martindale-Hubbell* at 21.

[16] Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (hereinafter cited as *Convention Explanatory Report*), *appended to Convention Transmittal* at 23-24, and *reprinted in Convention History* at 208; *1969 U.S. Hague Delegation Report* at 810.

[17] *Id.* The Nouveau Code de Procédure Civile ("New Code of Civil Procedure") enacted by France in 1975 contains specific provisions on international letters rogatory designed to implement the Convention procedures. Among these provisions are article 739, which permits letters of request to be executed in accordance with the instruction of a foreign court, and article 740, which permits foreign attorneys on authorization from the judge to examine witnesses. Article 739 denies

The grounds for refusing to execute a letter of request are narrow. Execution may be objected to if the letter does not comply with the provisions of the Convention. Art. 5, Pet. App. 28a.[18] Otherwise, execution may be refused only to the extent (a) that "execution of the Letter does not fall within the functions of the [executing State's] judiciary," or (b) that the executing State "considers its sovereignty or security would be prejudiced thereby." Art. 12, Pet. App. 30a. Any objections to execution must be promptly communicated to the Requesting Authority. Art. 13, Pet. App. 30a.

One additional ground on which execution of a letter of request could potentially be refused is found in article 23, which permits a party to reserve the right not to execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." Pet. App. 34a. Although the Republic of France has entered a reservation of rights pursuant to article 23, this reservation does not apply to the discovery of documents through letters of request, provided that the documents requested are enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation. The request must, of course, also be consistent with the Convention's general requirements regarding the nature of the requesting authority and respect for the requested State's public policy.[19]

French courts the right to refuse execution of letters of request on the grounds of incompatibility. 1 *New Code of Civil Procedure in France* 153, 214 (F. de Kerstrat and W. Crawford, trans, 1978).

[18]I.e., execution may be objected to if the letter is outside the Convention's scope as defined in article 1, does not contain the information required by article 3, is not expressed in the language specified by the State of execution in accordance with article 4, or does not conform to some other bilateral agreement between the nations in question (art. 32).

[19]*See* Letter from the Ministry of Justice to the Ministry of Foreign Affairs annexed to the Brief of the Republic of France as Amicus Curiae.

Article 23 was first proposed by the United Kingdom[20] and was intended to prevent abusive discovery practices by preserving the declaring State's right to apply internal standards of relevance and materiality to overbroad letters of request.[21] The language of article 23, however, is not aptly worded for this purpose and reflects a misunderstanding of the term "pre-trial discovery" and the role of pre-trial discovery in common law countries.[22] The United Kingdom has therefore clarified its declaration under article 23 with a further statement that it understands this reservation to apply only to letters of request lacking in specific-

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[20]*Convention History* at 155. The article was adopted by a vote of twelve to three with two abstentions (the U.S. voting in favor; Germany, France and Switzerland voting against; Greece and Luxembourg abstaining). *Id.* at 177.

[21]*1978 Report on Convention Operation at 1428; Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 24 Int'l Legal Materials 1668, 1677 (1985) (hereinafter cited as *1985 Report on Convention Operation)*. All Convention signatories except the United States, Barbados, Czechoslovakia, and Israel have made a declaration under article 23. Many signatories, for example Norway and the United Kingdom, have expressly qualified their reservation, making it applicable only to requests which are overbroad and not specific. *See Martindale-Hubbell* at 15-19.

[22]*See 1978 Report on Convention Operation* at 1427-28.

ity.[23] A majority of the contracting States are now prepared to limited their reservations in a similar manner.[24]

So limited, article 23 is merely an extension of article 3's requirement that a letter of request specify the evidence to be obtained or the documents to be inspected. Pet. App. 27a. Even absent an article 23 declaration, a letter of request couched in sweeping and indefinite terms could be returned unexecuted for failure to comply with article 3.[25] In practice, however, refusals to execute letters of request have been infrequent.[26]

In addition to the letter of request procedure, the Convention contains alternative methods of which respondents could also make use. Chapter II of the Convention liberalizes pre-Convention practices with respect to the permissibility of diplomatic and

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[23]The U.K. reservation states:

> Her Majesty's Government further declares that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purpose of the foregoing Declaration as including any Letter of Request which requires a person:
>
> a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
>
> b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power. [*Martindale-Hubbell* at 19.]

[24]*1985 Report on Convention Operation* at 1678.

[25]*Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 Int'l Legal Materials 1417, 1424 (1978) (hereinafter cited as *1978 Report of U.S. Delegation on Convention Operation*).

[26]*1978 Report on Convention Operation* at 1431. Petitioners know of no case in which a French court has refused to execute a letter of request.

consular officials taking evidence abroad.[27] It also introduces, in article 17, the use of private commissioners to take evidence, a practice previously not recognized in civil law nations.[28] "The evidentiary procedures which may be executed by diplomatic or consular officers are the same as those which may be carried out pursuant to a letter of request, namely depositions, written interrogatories, and production and inspection of documents and other physical items."[29] Likewise, private commissioners duly appointed in accordance with the terms of the Convention can exercise similar powers.[30] While the use of these alternative methods requires the permission of the State of execution,[31] the State here in question, France, has given such permission liberally,[32] and has made a specific declaration to facilitate the use of these methods.[33]

In executing a letter of request, the State of execution is required by the Convention to use appropriate measures of compulsion. Art. 10, Pet. App. 29a. Although compulsion is available to facilitate the gathering of evidence under the alterna-

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[27]Under article 15 of the 1954 Convention Relating to Civil Procedure, letters of request are executed by a judicial authority unless bilateral conventions between the states involved allow execution by diplomatic of consular agents, or the executing state "does not object."

[28]*Convention Transmittal* at VI, IX; *Report of the Special Commission* (hereinafter cited as *Special Commission Report*), *reprinted in Convention History*, at 68-69.

[29]Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 Int'l Law. 35, 41 (1979).

[30]*Id.* at 42.

[31]Arts. 16-17, Pet. App. 31a-32a.

[32]Borel & Boyd, 13 Int'l Law. at 41-42.

[33]*Martindale-Hubbell* at 16. The Brief of the Republic of France as Amicus Curiae describes in detail how foreign litigants can make use of the Convention's voluntary procedures to conduct discovery in France.

tive methods of Chapter II only for those states who so declare,[34] the Convention contains no requirement that a court of the requesting State forego appropriate sanctions against a party who unreasonably refuses to cooperate in voluntary procedures to which the State of execution has consented. In fact, the history of the Convention's negotiations suggests that, under such circumstances, sanctions might be appropriate.[35] In past litigation, SNIAS has cooperated with American litigants who chose to utilize a consular official or private commissioner to take evidence in France.[36]

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[34] Art. 18, Pet. App. 32a. Only the United States and Italy have made unqualified declarations of assistance under article 18. Czechoslovakia, Cyprus and the United Kingdom have declared that compulsion will be applied in the case of States offering reciprocal assistance. *Martindale-Hubbell* at 15-21.

[35]The question of the effect of a refusal by a witness to give evidence voluntarily before a consul or commissioner was considered by the Special Commission which convened in advance of the full Conference to prepare an initial draft Convention. The Commission reached no decision on this issue. *Special Commission Report* at 72. During the Conference, the Danish delegation proposed that:

> where no order of compulsion has been issued under article 16, refusal of a person to appear or to give evidence before the consul shall not render such person liable to any penalty or prejudice in relation to the proceedings for which the evidence is required. [*Convention History* at 149.]

The Danish proposal was rejected by a vote of thirteen to five with one abstention. *Id.* This vote was in essence ratification of the views of the Convention Rapporteur (Mr. Amram of the United States) who stated:

> [T]he Danish proposal related to a question which was fundamentally a matter for the internal law of each Contracting State. It should be for that law to determine the effect which would be given to a failure by a witness to give evidence. The Convention should not attempt to regulate this question. The effect of the Danish proposal would be to impinge on the administration of justice within the forum where the lawsuit was pending. [*Id.* at 150.]

[36]For example, documents were produced and depositions taken utilizing a commissioner appointed under the Convention procedures in

The French Blocking Statute. Petitioners in the present case are corporations formed under the laws of the Republic of France. SNIAS is wholly-owned by the Government of France; SOCATA is a subsidiary of SNIAS. Petitioners maintain no corporate offices, manufacturing plants or service facilities in the United States. All of petitioners' documents and business records relevant to the discovery sought here are located in France and thus are subject to the French Blocking Statute.[37]

The French Blocking Statute prohibits the disclosure of "economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence [establishment of proof] with a view to foreign judicial or administrative proceedings or in connection therewith" unless such disclosure is made in accordance with international agreements binding on France. Pet. App. 47a. The statute contains no provision authorizing its waiver; violations are punishable by fines and/or imprisonment. As a consequence, petitioners, their officers and employees face criminal exposure should they cooperate in discovery which disregards the procedures of the Hague Evidence Convention.

The French Blocking Statute was adopted in order to assure that American discovery practices on French soil conform with the rules laid down by the conventions for judicial assistance in effect.[38] Notwithstanding the entry into force of the Hague

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Bulkley v. Mel O'Reilly Helicopters, Ltd., et al., Civil No. C80-480T in the U.S. District Court for the District of Washington.

[37]Although this brief adopts the shorthand employed by the case law and refers to French Penal Code Law No. 80-538 as a "blocking statute", this term is a misnomer. As explained below, the French statute does not actually block the gathering of evidence for foreign proceedings but merely channels such activities through the Hague Evidence Convention and other judicial assistance treaties to which France is a party.

[38]National Assembly Report No. 1814, A Mayoud, Reporter for the Commission on Production and Exchanges, 36 (1980) (hereinafter cited as *Assembly Report)* ("assurer la conformité de ces investigations [de plaignants américains] sur le sol national avec les règles posées par les conventions d'entraide judiciares en vigueur").

Evidence Convention between the United States and France, private American plaintiffs had persisted in conducting discovery in France directed against French nationals outside the sanctioned channels.[39] The French Blocking Statute gives France the judicial means to put to an end practices which the National Assembly regards as infringing on French sovereignty[40] and to protect French enterprises from abusive foreign discovery practices.[41] The express reference to treaties or international agreements at the beginning of the statute was intended to relieve any fears of the other parties to the Hague Evidence Convention that the statute might interfere with the use of its procedures.[42]

The Proceedings Below. The claims in this case arise from the crash of a light aircraft near New Virginia, Iowa, on August 19, 1980. In two actions consolidated in the United States District Court for the Southern District of Iowa, plaintiffs allege that the aircraft manufactured by petitioners was defective and seek damages for personal injuries on theories of negligence and products liability.

In April and June 1985, plaintiffs served on petitioners several requests for admissions, a request for production of documents, and a set of interrogatories.[43] These requests concerned various advertisements, manufacturing records and general test data. Joint Appendix ("J.A.") at A-21-38. In response to plaintiffs' discovery requests, petitioners sought a protective order to require

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[39] *Assembly Report* at 33-34, 36.

[40] *Assembly Report* at 37 ("la France devait se doter de moyens juridiques propres à mettre un terme à des pratiques portant atteinte à sa souveraineté").

[41] *Id.*

[42] *Assembly Report* at 41.

[43] Earlier requests for documents were served in August 1983 and April 1984. Joint Appendix at A-19. Petitioners provided those documents available within the United States and advised respondents that documents located in France should be requested through the Convention procedures. Respondents did not pursue the matter further until their April 1985 requests.

that discovery abroad be conducted in accordance with the provisions of the Hague Evidence Convention. They informed the court that, to the extent they have documents or information responsive to these requests not already produced, this evidence is located in France and that its disclosure is prohibited by French law except in accordance with the Convention. J.A. at A-1. The motion for a protective order was denied. The magistrate explained that his decision was based on "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts." Pet. App. 24a. He also speculated that the French Blocking Statute is not strictly enforced in France. Pet. App. 25a.

SNIAS and SOCATA petitioned the court of appeals for a writ of mandamus to review the magistrate's order. Relying heavily on Fifth Circuit precedent, the court held that the Hague Evidence Convention does not apply to the discovery requests here in question. It stated:

> Although a minority of courts have adopted the position advanced by the Petitioners, in our opinion the better rule, which has been adopted by the vast majority of courts, is that when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention. [782 F.2d at 124, Pet. App. 4a.]

The court also adopted the analysis of the Fifth Circuit that "preparatory acts" which occur in foreign nations are not evidence gathering activities subject to the Convention. 782 F.2d at 124, Pet. App. 5a. Acknowledging that its decision would severely restrict the Convention's scope, the court observed: "the Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign nonparties who are not subject to an American court's jurisdiction and compulsory powers." 782 F.2d at 125, Pet. App. 6a.

The court then turned its attention to the French Blocking Statute which, in light of its earlier ruling that the Convention

does not apply, the court treated as an independent ground for petitioners' objections to compliance with discovery orders. On the basis of *Societé Internationale v. Rogers,* 357 U.S. 197 (1958), and its progeny, the court found that considerations of comity do not require any deference to the French Blocking Statute. 782 F.2d at 126, Pet. App. 10a.

SUMMARY OF ARGUMENT

The Hague Evidence Convention applies whenever a U.S. litigant seeks discovery of documentary evidence or information located in the territory of a foreign signator. Whether a U.S. court has in personam jurisdiction over the person or company to whom the discovery request is directed does not affect the Convention's applicability. Likewise, recasting a demand for inspection of files located abroad as a request for their production on American soil does not make it any the less extraterritorial in effect. U.S. obligations under the treaty cannot be circumvented through this geographic fiction. By ruling to the contrary, the decision below has relegated the Convention to disuse in all but the most unusual circumstances. Unless reversed, it will foster international conflict over evidence gathering in U.S. proceedings.

A basic purpose of the Convention is to reduce conflicts with the laws or clearly articulated policies of foreign nations over extraterritorial discovery demands by encouraging mutual judicial cooperation. Only through the Convention has the United States obtained the consent of civil law nations to evidence gathering within their borders. Its purpose is frustrated if adherence to the Convention's procedures becomes the exception instead of the rule.

Only if efforts to obtain relevant evidence through the Convention's procedures proves unsuccessful should use of domestic discovery rules be considered. Such an approach harmonizes the Convention with domestic rules without surrender of U.S. sovereignty or judicial power. In the present case, no efforts to use the Convention have been made because the court below mistakenly concluded that the Convention does not apply to the discovery requests here in question. Accordingly, its decision should be

reversed, and the case remanded to the trial court with instructions that the parties be required to adhere to the Convention's procedures.

Considerations of comity also require this result. Disclosure of the documents and information sought will violate the French Blocking Statute, as well as the judicial sovereignty of France, unless such disclosure is made through the procedures of the Convention. On the other hand, the procedures of the Convention can provide effective discovery in France. There is nothing in the record which indicates that use of the Convention would be fruitless or unduly burdensome. Accordingly, adherence to its procedures should be required.

ARGUMENT

I

THE HAGUE EVIDENCE CONVENTION APPLIES WHENEVER A U.S. LITIGANT SEEKS DISCOVERY OF EVIDENCE LOCATED IN THE TERRITORY OF ANOTHER SIGNATORY

In determining the applicability of the Hague Evidence Convention, the locus of the evidence and nature of the proceeding for which it is sought are the critical factors. Where, as here, evidence is sought for a judicial proceeding to decide a civil or commercial dispute and the evidence sought is located in the territory of another signatory to the Convention, the Convention applies. By holding to the contrary, the decision below has relegated the Convention to disuse in all but the most unusual cases.

A. The Convention Applies to Discovery Abroad Even From Persons Over Whom a Court Has Jurisdiction

The court below erred by holding that, because the court has personal jurisdiction over petitioners, the Hague Evidence Convention does not apply to the discovery of documents or information in their possession located within the territory of a foreign signatory. The Convention does not distinguish between parties and non-parties with regards to its applicability. Rather, the

history of the Convention indicates that it was intended to apply to parties as well as others, and the contracting States have so construed it.

The task of interpreting the Convention begins "with the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 105 S.Ct. 1338, 1341 (1985). The procedures for obtaining evidence described in the Convention do not distinguish between parties and non-parties. Article 3 states simply that a letter of request should specify, where appropriate, "the names and addresses of the *persons* to be examined" (emphasis supplied). Similarly, the procedures in Chapter II of the Convention speak of taking the evidence of "nationals" (arts. 15 & 16) and of a request to appear addressed to a "person" (art. 21).

The Convention's drafting history shows that the draftsmen intended its provisions to apply to parties and non-parties alike. In its memorandum proposing the Convention, the United States pointed to various provisions of Public Law 88-619, enacted in 1964, which significantly liberalized United States domestic law for providing assistance to foreign litigants and tribunals. The principles incorporated in Public Law 88-619 were delineated. No distinction was drawn between a party and non-party, only between a "willing" and "unwilling" party or witness. It was urged that "much could be gained if the members of the Conference could move towards . . . a relaxation of barriers against voluntary testimony by 'willing' *parties or witnesses.*" *U.S. Memorandum* at 17 (emphasis supplied).[44]

A vote on a Danish proposal during the Conference makes quite clear that the understanding of the U.S. delegation was shared by the other parties. The Danish delegate proposed replacing the word "witness" in what eventually became article 21(b) of the Convention with the word "person," in order to "clarify that [the article] applied to *all* witnesses requested to give evidence in a lawsuit, including the parties." *Convention History*

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[44]In responding to the pre-Conference questionnaire, the United States repeated its earlier statement urging as a goal of the Conference a "relaxation of barriers against voluntary testimony by a *party* or witness." *Convention History* at 28 (emphasis supplied).

at 148 (emphasis in original). The Conference President called the proposal completely justified ("tout à fait justifiée") and it was unanimously adopted. *Id.*

That the Convention was intended to apply to persons over whom a court has jurisdiction is also apparent from the parties' practical construction of it.[45] The governments of France, Germany and the United Kingdom have indicated that they regard the procedures of the Hague Evidence Convention as applicable in such circumstances. Each has filed an amicus brief with the Court so stating. The view of the United States is identical. In *Volkswagenwerk A.G. v. Falzon*, 464 U.S. 811 (1983), *appeal dismissed*, 465 U.S. 1014 (1984), the Solicitor General informed the Court that the Convention's "strictures apply regardless of the existence of personal jurisdiction."[46]

The decision below appears to conclude that the assertion of extraterritorial jurisdiction, based upon "minimum contacts," relieves the court from the obligations of international judicial cooperation imposed by the Convention. It thereby confounds the issue of whether personal jurisdiction exists with the separate question of whether exercising the power to compel would be

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[45]"In ascertaining the meaning of a treaty [the Court] may look beyond its written words to . . . [the contracting parties'] own practical construction of it." *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933); *see Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943).

[46]In *Volkswagenwerk*, the Solicitor General explicitly rejected the rule, adopted by the Eighth Circuit here, that the Convention has no applicability where the court has jurisdiction over the foreign person against whom discovery is sought:

> The fact that a state court has personal jurisdiction over a private party . . . does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of the parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction. [Brief of United States as Amicus Curiae at 7 n.3.]

appropriate.[47] Unless reversed, the decision below would make violation of the judicial sovereignty of the civil law nations the rule rather than the exception.

B. The Convention Cannot Be Circumvented Through Demands That Evidence Located Abroad Be Produced on U.S. Soil

As an additional or alternative ground for holding the Convention inapplicable to the discovery requests here in question, the decision below invents a geographic fiction based upon where discovery "takes place." It states that "matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention." 782 F.2d at 124, Pet. App. 5a, *quoting In re Anschuetz & Co., GmbH*, 754 F.2d 602, 611 (5th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98). This distinction elevates form over substance. It has no basis in the language of the treaty, its history or its construction by the parties. Convention procedures are applicable to any discovery request that requires a person to take action on the territory of a foreign signator. The test is simply whether the discovery demand has extraterritorial effect and has been made in a judicial proceeding concerning a civil or commercial matter.

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[47] "The decision to assert in personam jurisdiction over a foreign defendant in a civil action does not, and should not, involve a detailed inquiry as to the reasonableness of subjecting that person's property, employees, and affiliates throughout the world to the compulsory power of the court. To assume that all the property, employees, and affiliates of a company are subject worldwide to the compulsory discovery orders of all the courts before which a company might be ordered to appear as a defendant in a civil action is, in the end, to require that the rationality of such a course of action be weighed in each case as part of the decision whether to exercise jurisdiction over the defendant at all. The eventual effect well could be to reduce the number of forums open to the plaintiff in the first instance." Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 740 (1983).

Convention procedures are intended to protect the sovereignty of the contracting States as well as to facilitate the production of evidence. One aspect of a nation's sovereignty is the power to regulate (and also protect) the activities of its own nationals, particularly on its own soil. Would the United States have no concern if a German court ordered production of a U.S. citizen's confidential disclosures to his American lawyer in San Francisco, so long as the production occurred in Frankfurt? Would U.S. concern over a French court's order for production of business secrets from a U.S. aircraft manufacturer in St. Louis disappear as soon as it was made clear that the production would occur in Paris? To say that making a foreign national bring documents or information to the United States removes the foreign sovereign's legitimate concerns is to make a mockery of the principles of consent, cooperation and reciprocity underlying the Convention.

The Convention itself contains no distinction between preparatory acts and discovery. In fact, it employs neither term. Rather it addresses any "taking of evidence." The other parties to the Convention have made quite clear that they reject the distinction relied upon by the court below and that it fails to consider their sovereign interests. France, Germany and the United Kingdom have each filed an amicus brief here so stating. Further, in the process of drafting the Hague Evidence Convention, many of the participating governments expressed the view that even the voluntary gathering of evidence within their territory infringed upon their judicial sovereignty if not done in cooperation with their judiciary.[48]

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[48] The concern of the civil law nations for the protection of their judicial sovereignty in the evidence gathering process was clearly expressed in response to a questionnaire distributed prior to the drafting session. Among the questions asked was, "Is there in your State any legal provision or any official practice, based on concepts of sovereignty or public policy, preventing the taking of voluntary testimony for use in a foreign court without passing through the courts of your State?" *Convention History* at 10. France replied that its concept of sovereignty and public order required that no evidence be taken on French territory except by its judicial authorities. *Id.* at 33. The German Government

On the basis of concerns for sovereignty, similar to those underlying the Convention, a number of the United States' closest allies and trading partners, including the United Kingdom, Canada, the Netherlands and France, have enacted statutes designed to maintain control of evidence gathering within their borders.[49] These statutes recognize no distinction between preparatory acts and the physical production of evidence. Generally, where their prohibitions apply, they apply to both.[50] The legislative history of the French Blocking Statute makes very clear that the law was adopted in order to put an end to evidence gathering activities conducted in France by private parties for use in foreign proceed-

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stated that the hearing of a witness in a judicial proceeding constitutes an act of sovereignty which may only be performed by a judge or other legally authorized agent and that the obligation to testify established by foreign law cannot be extended onto German territory because it emanates from a foreign sovereign power. *Id.* at 22. Similar sentiments were expressed by Belgium (*id.* at 26), Italy (*id.* at 35), Luxembourg (*id.* at 37), Switzerland (*id.* at 44), Turkey (*id.* at 45), and Norway (*id.* at 38). *See also* Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters,* 18 Int'l & Comp. L. Q. 646, 647 (1969).

[49]Protection of Trading Interests Act, 1980, 29 Eliz. 2, ch. 11 (United Kingdom); Foreign Extraterritorial Measures Act, 1984, 33 Eliz. 2, ch. 49 (Canada); Economic Competition Act of June 1956, as amended by the Act of 18 February 1971, the Act of 15 December 1971 and the Act of 29 June 1977 (Netherlands); French Blocking Statute, Pet. App. 47a-51a.

[50]For example, a "request" for documents or information located in France "with a view to foreign judicial or administrative proceedings" violates the French Blocking Statute unless made through the Convention. Pet. App. 48a. Thus the "preparatory" acts of locating and assembling documents or information in France would fall squarely within the statute's prohibition. Similarly, the Canadian Foreign Extraterritorial Measures Act empowers the Canadian Attorney General to prohibit or restrict "[t]he doing of any act in Canada in relation to records" located in Canada that is likely to result in disclosures of such documents or the information they contain "for the purposes of a foreign tribunal." 33 Eliz. 2, ch. 49, § 3.

ings which were bypassing the Convention.[51] Other countries have adopted blocking statutes because of similar concerns.[52] Thus, not only is the distinction invented by the decision below (and the cases on which it relies) not found in the text of the Convention, but it condones invasion of precisely those interests which the Convention was designed to protect.

II

THE CONVENTION SHOULD BE USED FOR GATHERING EVIDENCE ABROAD

The Hague Evidence Convention represents a weighing and balancing of divergent sovereign interests. In order to avoid conflicts of law when a litigant seeks evidence located in one signatory for use in proceedings in another, the parties have each pledged to make available minimum procedures for obtaining evidence which may be supplemented bilaterally, or even unilaterally by the state executing the request. To serve this purpose, the Convention's procedures must be used before resort to domestic law is considered.

A. Treatment of the Convention As Merely Optional Frustrates its Basic Purpose

"The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them." *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928). The basic purpose of the Hague Evidence Convention is to foster

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[51]*Assembly Report* at 36-37, *see* notes 38-42 and accompanying text, *supra.*

[52]"A number of countries, in a reaction against what they conceive of as abuses inherent in some forms of pre-trial discovery combined with exorbitant assertions of judicial jurisdiction, have adopted . . . statutes which prohibit the production of certain evidence abroad or provide for the possibility that an order may be made prohibiting such production." *1985 Report on Convention Operation* at 1675.

mutual judicial cooperation in gathering evidence for civil or commercial matters; avoiding conflicts between contracting states over procedures for obtaining evidence is one of its central objectives. Only through the Convention have civil law nations given consent to U.S. evidence gathering activities within their borders. By ratifying the Convention, the United States has pledged itself both to mutual judicial assistance and to self-restraint in use of its own methods for gathering evidence abroad. The basic purpose of the Convention is frustrated, and reciprocity defeated, when U.S. courts treat the Convention's procedures as merely optional.

1. The Convention Is Intended to Accommodate Divergent Legal Systems

The history of the Hague Evidence Convention shows that it was adopted in large measure to avoid the friction created by the extraterritorial application of domestic discovery procedures. The task of its draftsmen was to harmonize the differing legal philosophies and concepts of sovereignty of the common law and civil law nations and "to locate a procedural device which would be acceptable to all the differing systems."[53] Indeed, the United States was the chief proponent of such a convention and obtained important concessions from the civil law nations on the basis that the Convention's procedures would be a substitute for the unsupervised extraterritorial use of federal discovery rules, which those nations regard as oppressive and an invasion on their sovereign rights.

From the standpoint of the civil law nations, the protection of their judicial sovereignty was an important consideration in fixing the terms of the Hague Evidence Convention. The report of the U.S. delegation which participated in the Convention's drafting notes this concern:

> In drafting the Convention, the doctrine of "judicial sovereignty" had to be constantly borne in mind. Unlike the common-law practice, which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities.
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> The act of taking evidence in a common-law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil-law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the "judicial sovereignty" of the host country, unless its authorities participate or give their consent. [*1969 U.S. Hague Delegation Report* at 806.]

In the discussions which resulted in the Hague Evidence Convention, the civil law nations agreed to liberalize and simplify the process for obtaining evidence through their courts for use abroad as the quid pro quo for lessening foreign intrusions on their judicial sovereignty.[54]

In contrast, the primary U.S. objective in the treaty negotiations was to minimize the difficulties in obtaining evidence from countries with different legal systems.[55] The United States recognized that "other countries for historic and other reasons have different legal procedures for affording assistance to litigants before foreign and international tribunals," but urged that "much could be gained" through movement towards the following objectives —

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[53] *Special Commission Report* at 56; *see 1969 U.S. Hague Delegation Report* at 806.

[54] "[I]f the convention does not restrict unilateral extraterritorial discovery methods, then the civil law countries received no meaningful quid pro quo for their concessions to the United States under the convention. While there is no requirement of 'consideration' in international treaty law, unilateral concession is not the most probable explanation for the behavior of governments in international negotiations." Oxman, 37 U. Miami L. Rev. at 760-61.

[55] *Senate Foreign Relations Committee Report* at *1; Convention History* at 28.

1. A relaxation of barriers against voluntary testimony by "willing" parties or witnesses;

2. A willingness to permit, under court supervision, use of the techniques of examination of the foreign forum;

3. A resort to a more efficient and less expensive method of transmitting documents of international judicial assistance, and

4. An expansion of the categories of officers before whom testimony may be taken to include, for example, commissioners and consuls.[56]

The Convention achieves these objectives.[57] It represents a compromise among the countervailing interests of the United States and the civil law nations intended to foster mutual judicial cooperation among the contracting States.[58] The heart of this compromise is to establish minimum standards and procedures for extraterritorial evidence gathering which are tolerable to the authorities of the state where the evidence is taken and of use in the forum where the action will be tried.[59]

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[56]*U.S. Memorandum* at 17.

[57]In evaluating the Convention, the U.S. delegation to the drafting stated:

> The United States delegation considers that the Convention is a major contribution to the elimination of formal and technical obstacles to securing evidence abroad in a form that is usable in the requesting court. [*1969 U.S. Hague Delegation Report* at 820, *reprinted in Convention Transmittal* at X.]

[58]Preamble, Hague Evidence Convention, Pet. App. 26a; *Convention Transmittal* at III ("This Convention is a significant step forward in the field of international judicial cooperation").

[59]*1969 U.S. Hague Delegation Report* at 806; *Convention Explanatory Report* at 11; Amram, 67 Am. J. Int'l L. at 106.

2. Only Through the Convention Have Civil Law Nations Given Consent to Foreign Evidence Gathering Activities Within Their Borders

When a court attempts to exercise its power in the territory of another nation, basic principles of international law require that foreign nation's consent.[60] Conducting discovery abroad is the exercise of such power.[61] While in some cases consent to the extraterritorial exercise of power might be implied, the Convention's history makes clear that this is not the case with regard to the conduct of discovery by foreign litigants in civil law nations.

France regards the Convention's procedures as the mandatory and exclusive means of obtaining evidence located on its soil for use in U.S. judicial proceedings concerning a civil or commercial matter.[62] This follows directly from the civil law view that evidence gathering is an exercise of judicial sovereignty. "Some states [regard] the taking of evidence and similar acts as being essentially judicial and therefore solely within the jurisdiction of

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[60]Chief Justice Marshall authored the classic American formulation of this principle:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restrictions .... All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. [*The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).]

[61]"Under established principles of both domestic and international law ... American courts are precluded from ordering anyone to participate in discovery proceedings in the territory of a foreign state absent that state's consent, wholly independent of the Evidence Convention." Brief for the United States as Amicus Curiae, *Club Mediterranee, S.A. v. Dorin*, 465 U.S. 1019 (1984), *reprinted in* 23 Int'l Legal Materials 1332, 1338 (1984). *See also* Restatement of U.S. Foreign Relations Law (Revised) vol. 1 at 386 (Tent. Draft No. 6, 1985).

[62]Brief of Republic of France as Amicus Curiae. *See also* Pet. App. 52a-57a (diplomatic note from Republic of France).

their courts."[63] The doctrine of judicial sovereignty "gives to the judicial authorities of the State the *exclusive* control over the taking of evidence and forbids any outside person from taking evidence without the permission and control of the judicial authorities of the State."[64]

Efforts to avoid "intrusions [on judicial sovereignty] and to provide an orderly system for foreign discovery" of evidence[65] resulted in the adoption of the Hague Evidence Convention. The United States proposed the drafting of an evidence convention in order to define "methods to satisfy doctrines of judicial sovereignty"[66] and thus obtain consent to U.S. evidence gathering abroad.[67]

When the Convention's procedures are followed, the requisite consent is present. When they are not, the domestic law of France and other countries prohibits the taking of evidence for use in foreign judicial proceedings.

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[63]*Convention History* at 128.

[64]*Convention History* at 63 (emphasis supplied). The question of the Convention's exclusivity was considered at the most recent meeting of the special commission on its operation. The report of the meeting notes that "certain States consider the taking of evidence in their territory to be a judicial act which, in the absence of permission, will violate their sovereignty, and consequently the operation of the Convention in their territory will take on an exclusive character." *1985 Report on Convention Operation* at 1678.

[65]*Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983).

[66]*Convention History* at 55.

[67]In proposing an evidence convention, the U.S. acknowledged that the federal rules of discovery could not authorize the use of extrajudicial techniques for the taking of evidence abroad "in countries that object to their use on the ground of judicial sovereignty." *Convention History* at 28-29. It was further stated that extrajudicial discovery procedures were used abroad only "when not offensive to the law of the State in which the examination is to take place." *Id.* at 31.

3. The Convention Is a Balancing of Sovereign Interests Ratified by the United States

The Hague Evidence Convention represents a balancing of sovereign interests intended to avoid conflicts between different legal systems. U.S. courts applying the principle of comity engage in a similar balancing. *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). This process of balancing sovereign interests is not, however, exclusively the province of the judiciary.[68] Each time the political branches conclude a treaty which creates rules of private international law, they engage in a process of balancing sovereign interests which affects the rights of U.S. and foreign citizens alike.

The United States and the other parties to the Hague Evidence Convention share a common interest in maintaining an effective transnational system of laws which facilitates the flow of commerce among nations.[69] This requires rules which provide private parties predictability in planning transactions and settling disputes.[70] It also requires restraint in enforcement of domestic law

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[68]*See* Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. Rev. 665, 727-30 (1986) (treaty law should be regarded as more authoritative than customary international law as source for rule of decision).

[69]The Court has long recognized the paramount interest of the United States in maintaining a stable and reciprocally fair system for transnational interactions. "[International law] aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own." *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953). *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974) (uncertainty arising from refusal to enforce arbitration clause "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements"); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959) ("The controlling considerations are the interacting interests of the United States and of foreign countries . . . ").

[70]This Court has frequently recognized the importance of predictability in the international business setting as a factor in determining

abroad. "We cannot have trade and commerce in world markets and international waters exclusively on our own terms, governed by our laws, and resolved in our courts." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972).[71]

The judicial function concerns itself with the application of agreed principles; in their absence, the Court has been properly reluctant to render decisions which may lead to conflicts with the laws of other nations. *See Banco Nationale de Cuba v. Sabbatino*, 376 U.S. 398 (1964).[72] On numerous occasions, the Court has refused to extend the jurisdiction of a federal statute to apply to foreign parties without a clear expression of intent from the political branches, where doing so would result in a conflict with foreign or customary international law.[73] In particular, the Court has declined to exercise U.S. jurisdiction in derogation of the provisions of a ratified treaty.[74]

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applicable U.S. law. *See*, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346 (1985); *Scherk*, 417 U.S. at 516-19; *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-15 (1972).

[71]*See also Mitsubishi*, 105 S.Ct. at 3355; *Scherk*, 417 U.S. at 519; *Sabbatino*, 376 U.S. at 433.

[72]"It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or international justice." 376 U.S. at 428.

[73]"For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to Congress rather than the courts." *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957). *See also Windward Shipping v. American Radio Association*, 415 U.S. 104 (1974); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963).

[74]*See Scherk*, 417 U.S. at 520-21 n.15 (1974) (enforcement of arbitration clause effectuated purpose of treaty.)

The Hague Evidence Convention represents a negotiated balancing of divergent sovereign interests designed to promote a smoothly functioning transnational commercial system. It provides mechanisms for taking evidence and consent to their employment. This accommodation of U.S. and foreign interests was actively encouraged by the United States and has been ratified by the political branches of the government. Courts derogate from the obligations of the treaty when they disregard its procedures or treat them as merely optional. *See Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657-58 (1854).

B. Requiring First Use of the Convention Avoids Conflicts with Both U.S. and Foreign Law

In each instance where a U.S. court rules that adherence to the Convention's procedures is unnecessary to obtain documents or information located abroad, the court creates a conflict with foreign law which could otherwise have been avoided. Only by requiring use of the Convention, at least in the first instance, can courts give effect to the Convention's purpose and avoid most such conflicts. This does not require surrender of U.S. sovereignty or judicial power. Such a construction of the Convention harmonizes it with the federal rules and is consistent with the approach to foreign discovery taken by the new Restatement of Foreign Relations Law of the United States.

There is no inherent conflict between the Hague Evidence Convention and the federal discovery rules. Both are laws of the United States through which evidence can be sought. The federal rules contain provisions which contemplate the use of special procedures for discovery related to transnational litigation both in U.S. courts and abroad.[75] Use of the federal discovery rules,

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[75]Rule 28(b) specifically contemplates that U.S. litigants will use the methods authorized by the Convention to take evidence abroad — i.e., letters of requests and commissions — and allows the admission of such evidence in U.S. proceedings even though it may not conform to all formal requirements of U.S. law. Other provisions of the rules give courts the tools necessary to structure evidence gathering in accordance with the Convention and the practices of the other signatories. Rule 16 encourages the courts to control and actively manage the progress of

however, frequently runs afoul of foreign statutes, policies or procedures. "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States." Restatement of U.S. Foreign Relations Law (Revised) § 437, Reporter's note 1 (Tent. Draft No. 7, 1986).[76]

A rule requiring first resort to the Convention where both the Convention and the federal rules apply gives effect to each. *See Watt v. Alaska,* 451 U.S. 259, 267 (1981).[77] Yet assuming arguendo that the Convention and the federal discovery rules are irreconcilably conflicting, under accepted principles of statutory and treaty construction, such conflicts must be resolved in favor of the Convention's use. First, the Convention is designed specifically to govern the taking of evidence in foreign nations, while the federal rules apply generally to all district court proceedings. "It is a well settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *Kepner v. United States,* 195 U.S. 100, 125 (1904).[78] Also,

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cases before them, including discovery matters. The second paragraph of Rule 26(b)(1) authorizes the courts to limit the scope, amount or method of discovery. It was added to the federal rules in 1983 in an effort to curb abuses of the discovery process by discouraging redundant, overbroad and unnecessarily burdensome requests. Advisory Committee Notes on 1983 Amendment.

[76]This tentative draft amends and supplements the prior tentative drafts. With these revisions, the tentative draft has now been adopted by the American Law Institute as Restatement (Revised). 54 U.S.L.W. 2593, 2595 (May 27, 1986).

[77]"By the Constitution, a treaty is placed on the same footing, and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land and no superior efficacy is given to either over the other." *Whitney v. Robertson,* 124 U.S. 190, 194 (1888).

[78]*See Clifford MacEvoy Co. v. United States,* 322 U.S. 102, 107 (1944); *Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208 (1932); *Harris v. Browning-Ferris Industries Chemical Services, Inc.,* 100 F.R.D.

because the Convention was ratified after the federal rules were in effect, the Convention should prevail. *Watt v. Alaska,* 451 U.S. 259, 285 (1981) (Stewart, J., dissenting); *Cook v. United States,* 288 U.S. 102, 118-19 (1933).[79]

Use of the Convention is consistent with the general approach to foreign discovery advocated by the new Restatement of Foreign Relations Law of the United States. The Restatement acknowledges the well-established principle that consent is required for the exercise of judicial power within the territory of a foreign sovereign and that extraterritorial discovery is in fact the exercise of such power.[80] Such consent is most clearly given through an international agreement which, under the doctrine of *pacta sunt servanda,* "is binding upon the parties to it and must be performed by them in good faith." Restatement of U.S. Foreign Relations Law (Revised) vol. 2 § 321 (Tent. Draft No. 6, 1985). In the absence of such agreement, the Restatement counsels judicial restraint.

The Restatement recognizes the friction which has been generated by American discovery abroad. To avoid such friction, it encourages courts to exercise greater control over extraterritorial discovery than they do in strictly local matters. In the absence of a specific treaty regulating discovery abroad, section 437(1) "contemplates that, in civil litigation in the United States affect-

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775, 777-78 (M.D. La. 1984) (Hague Service Convention prevails over Fed. R. Civ. P. 4 because "aimed specifically at service of process made in foreign countries").

[79]Although the federal rules have been amended since the Convention took effect, these amendments make no mention of the Convention and have no effect on the operation of its procedures. They do not provide a basis for concluding that the federal rules supersede the Convention. Such an implicit repeal of a treaty is strongly disfavored. *See Trans World Airlines v. Franklin Mint Corp.,* 466 U.S. 243, 252 (1984).

[80]"The underlying principal of international law reflected in this subchapter is that neither service of judicial documents nor taking of evidence in connection with litigation may be conducted without that state's consent express or implied." Restatement of U.S. Foreign Relations Law (Revised) vol. 1 at 386 (Tent. Draft No. 6, 1985).

ing foreign interests, courts control discovery practices from the outset of litigation pursuant to Rule 16 of the Federal Rules of Civil Procedure and comparable State rules." Restatement of U.S. Foreign Relations Law (Revised) § 437, comment a (Tent. Draft No. 7, 1986). The comments on section 437 emphasize that, as a matter of good practice, requests for discovery abroad should be made by the courts, not the litigants, and that the courts should scrutinize requests closely to curb excessive demands.

> Before issuing an order for production of documents, objects or information located abroad, the court . . . should scrutinize a discovery request more closely than it would scrutinize comparable requests for information located in the United States . . . . Given the degree of difficulty in obtaining compliance, and the amount of resistance that has developed in foreign states to discovery demands originating in the United States, it is ordinarily reasonable to limit foreign discovery to information necessary to the action (t*y*pically, evidence not otherwise readily obtainable) and directly relevant and material. [*Id.*]

The Restatement notes that the second paragraph of Rule 26(b)(1) gives the federal courts the power to impose such limitations on discovery. *Id.*

Like the Hague Evidence Convention, section 437 of the Restatement is based upon a recognition that the exercise of jurisdiction extraterritorially must be tempered in order to avoid conflicts and to foster the interest of the United States in a smoothly functioning transnational commercial system. *See* Restatement of U.S. Foreign Relations Law (Revised) § 403 & comment a (Tent. Draft No. 7, 1986). In fact, section 437 directs that resort to international judicial assistance be considered before an order based on domestic rules is issued.[81]

[81] § 437(1)(c) (court should consider "the availability of alternative means of securing the information"); *see* § 473 Reporter's note 6 (Tent. Draft No. 6, 1985). Section 473 recognizes the general principle of international law that "a state may determine the conditions for taking evidence in its territory in aid of litigation in another state," and describes generally the Hague Evidence Convention. Section 473 does not squarely address the precise issues presented by this case, and the comments indicate only that U.S. law in this area is unsettled. *See* comment b & Reporter's note 6.

Requiring use of the Convention will not hamper unduly the power of U.S. courts. They will retain their power under the federal rules to compel discovery, to draw adverse inferences from failures to produce evidence, or to impose other sanctions. In determining whether such measures are appropriate and in fashioning an appropriate order, the court will have the benefit of a developed record with which to evaluate the relevant considerations, including, in the case of an unexecuted letter of request, a statement of objections from a foreign court. However, for the same reasons that first use of the Convention should be required, orders compelling discovery or imposing sanctions under the federal rules should not become routine in such cases. Rather, such orders should rest on express findings that (1) use of the Convention has been attempted, (2) directly relevant, necessary and material evidence exists which could not be obtained through the Convention's procedures, and (3) a balancing of relevant interests, including the sovereign interests of each nation involved as well as the long-term interests of the international system, supports such an order.

III

CONSIDERATIONS OF INTERNATIONAL COMITY ALSO SUPPORT USE OF THE CONVENTION

By giving effect to the Convention, which represents a weighing and balancing of sovereign interests, the Court can avoid the sensitive task of balancing such interests itself. Both the Convention and the federal rules are U.S. law which the courts are bound to administer. As we have shown, requiring use of the Convention, at least in the first instance, effectuates the Convention's purpose, and construes it in harmony with federal discovery rules. Thus, considerations of international comity, which concern the resolution of conflicts between U.S. and foreign law, need not be addressed here. However, such considerations also support the

conclusion that the Convention should be used in the first instance, both as a general rule and on the specific facts of this case.

The principle of international comity requires U.S. courts to avoid creating conflicts with foreign law when possible and to consider self-restraint as a means of resolving those conflicts which do arise. The decision below creates a direct conflict with French law that could be avoided through use of the Convention. The procedures of the Convention provide effective methods for obtaining documents and information located in France, and there is nothing in the record here to support a claim that their use would be futile or unduly burdensome.

A. Comity Considerations Caution Against the Unnecessary Creation of Conflicts With Foreign Law

U.S. courts apply the principle of comity to avoid conflicts and accommodate the important sovereign interests of other nations where such accommodation can be achieved consistent with the rights of its own citizens or others under the protection of its law. *Hilton v. Guyot*, 159 U.S. at 163-64. "'Comity,' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other." *Id.*[82] The

[82]In *Anschuetz*, the Solicitor General commended to the Court a "flexible" comity inquiry which "depends on the circumstances of each individual case." *See* Brief for the United States as Amicus Curiae, *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority, petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98), and *Messerschmitt Bolkow Blohm, GmbH v. Walker, order granting cert. vacated*, 54 U.S.L.W. 3809 (U.S. June 9, 1986) (No. 85-99), at 12. This analysis is said to depend on "intractable factors" which make it "difficult for this Court to provide additional specific guidance to the lower courts." *Id.* at 20. This approach to comity may be adequate and appropriate for the Executive Branch in the conduct of U.S. foreign relations but generates no rules with which courts can reach principled decisions resolving justiciable controversies presenting conflicts between U.S. and foreign laws. What the Solicitor General has commended to the Court is a political concept of comity, concerned with maintaining amicable external relations, which as a legal principle amounts to no more than "mere courtesy and good will."

legal concept of comity is a principle of conflict of laws enabling courts to choose when and how far to apply domestic law and when and how far to recognize interests protected by foreign law.[83] Comity as a generator of choice-of-law principles has long been employed in the jurisprudence of this Court in formulating general rules to govern recurrent factual situations.[84]

Application of comity as a choice of law principle in the present context results in a rule requiring first use of the Convention, both as a general matter and on the facts of this case. First, use of U.S. discovery procedures abroad often violates foreign law and is a source of international friction.[85] Here there is a direct conflict with the French Blocking Statute. Second, the United States and the other parties to the Convention, including France, share an interest in establishing an effective and predictable system of mutual judicial assistance which avoids such friction.[86] Third, the Convention provides an effective means to obtain evidence located in France as well as in other signatory nations.[87] Only where use of the Convention proves unsuccessful should courts consider the use of domestic discovery procedures.

The creation of a direct conflict with foreign law is a very important comity consideration favoring restraint in the extraterritorial application of domestic law. "American courts should

[83]*See* Maier, *Extraterritorial Jurisdiction at a Crossroads*, 76 Am. J. Int'l L. 280, 283-84 (1982); J. Story, *Commentaries on the Conflict of Laws* 32-33 (Bigelow ed. 1883).

[84]*See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 105 S.Ct. at 3355-56 (comity requires enforcement of provisions in international agreements to arbitrate antitrust claims); *Lauritzen v. Larsen*, 345 U.S. at 577-78, 593 (Jones Act not applicable to injuries occurring on foreign flag vessel outside U.S. waters); *Canadian Southern Railway Co. v. Gebhard*, 109 U.S. 527, 539 (1883) (comity requires U.S. courts to recognize bankruptcy reorganization plans in foreign courts).

[85]*See* discussion at notes 48-67 and accompanying text above.

[86]*See* discussion at notes 68-74 and accompanying text above.

[87]*See* discussion at notes 92-102 and accompanying text below.

refrain, whenever it is feasible, from ordering a person to engage in activities that would violate the laws of a foreign nation." *Compagnie Francaise D'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16, 28 (S.D.N.Y. 1984). "Ordinarily, a state may not enforce a regulation in circumstances that require a person to do something in another state prohibited by that state." Restatement of U.S. Foreign Relations Law (Revised) § 403, comment e (Tent. Draft No. 7, 1986). This is particularly so where, as here, the order is directed to a foreign national,[88] compliance with the order would result in criminal exposure,[89] and alternative methods are available to achieve the same end.[90]

In the present case, disclosure of the documents and information sought will violate the French Blocking Statute, as well as the judicial sovereignty of France, *unless* such disclosure is made through the procedures of the Hague Evidence Convention. Under the French Blocking Statute, petitioners and their employees would be subject to criminal penalties for furnishing documents or information located in France in response to discovery

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[88]*See Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 244-5, 186 Cal.Rptr. 876, 880-81 (1982). *See also* Restatement (Second) of Foreign Relations Law of the United States § 40, comment d (1962) and Restatement of U.S. Foreign Relations Law (Revised) § 403(2)(b) (Tent. Draft No. 7, 1986).

[89]*See United States v. First National Bank of Chicago*, 699 F.2d 341, 345-6 (7th Cir. 1983); *In re Westinghouse Litigation*, 563 F.2d 992, 997 (10th Cir. 1977). *See also* Restatement (Second) of Foreign Relations Law of the United States § 40(b), comment c (1962) ("In determining whether to refrain from exercising jurisdiction, a state must give special weight to the nature of the penalty that may be imposed by the other state").

[90]*See United States v. Vetco*, 691 F.2d 1281, 1290 (9th Cir.) *cert. denied*, 454 U.S. 1098 (1981); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 858, 176 Cal. Rptr. 874, 884-85 (1981)("[I]f a channel more apt to elicit the cooperation of the foreign government is plainly available but is not used, then in our view insufficient account of the requirements of international comity had been taken . . . ."). *See also* Restatement of U.S. Foreign Relations Law (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986).

requests made directly under the federal rules, and the statute contains no provision for its waiver. Further, the statute was expressly adopted to protect the judicial sovereignty of France by requiring adherence to the Convention's procedures in response to charges that they were being routinely circumvented, primarily by American plaintiffs.[91] Thus, the French Blocking Statute expresses as clearly as possible the strong interest of France in regulating the gathering of evidence on its soil.

B. Effective Discovery Can Be Obtained Under the Convention

The procedures of the Convention can provide effective discovery within France. Through letters of request or proceedings before a consular official or private commissioner, respondents could obtain answers to written interrogatories, production of documents or depositions.[92] Further, France has enacted legislation authorizing French courts to carry out letters of request in accordance with methods requested by foreign courts.[93] This means that evidence so gathered can be taken in a form utilizable in U.S. courts.[94]

Respondents have made no attempt to employ the Convention's procedures.[95] The trial court should be instructed that only after such attempts have been made should any requests for further assistance be considered. The court would then be in a position to weigh comity considerations, including respondents' further needs, if any, on the basis of a developed record.

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[91]*See* notes 38-42, *supra* and accompanying text.

[92]*See* arts. 15-17, Pet. App. 31a-32a; Borel & Boyd, 13 Int'l Law at 41.

[93]*See* note 17, *supra* and accompanying text.

[94]Rule 28(b) also insures this result.

[95]As several courts have noted, until a party makes proper application under the Convention for evidence located abroad, we cannot know what discovery can be obtained. *See, e.g., Gebr. Eickhoff Maschinfabrik und Eisengieberei v. Starcher*, 328 S.E.2d 492, 502 (W. Va. 1985); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686, 690 (1984).

Respondents have previously represented to the Court that they should not be required to make use of the Convention's procedures because such attempts would be futile.[96] These arguments are based upon a misunderstanding of the Convention as well as France's implementation of it.

Respondents have primarily based their claim that use of the Convention would be futile on France's declaration under article 23, reserving its right not to execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." The Court should not assume that countries which have exercised their right under article 23 will fail to cooperate in providing requested evidence contained in documents. To the contrary, the general intent of this reservation was only to prevent discovery of a "fishing" nature.[97] According to the Special Commission on the Convention's operation, "[r]efusal to execute turns out to be very infrequent in practice."[98] Moreover, the Convention narrowly circumscribes those situations in which the execution of a letter of request may be refused. Art. 12, Pet. App. at 30a. It also expressly contemplates good faith attempts by foreign courts to implement any legitimate discovery request. Art. 9, Pet. App. at 29a.[99]

Although the Republic of France has reserved its rights pursuant to Article 23 of the Convention, this reservation does not apply to letters of request seeking the discovery of documents which are enumerated and have a direct and clear nexus with the subject matter of the litigation.[100] In matters similar to the present one, the French Ministry of Foreign Affairs has advised U.S.

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[96]Brief in Opposition to Petition for Certiorari at 12-14.

[97]*1978 Report of U.S. Delegation on Convention Operation* at 1421.

[98]*1978 Report on Convention Operation* at 1431.

[99]*See Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. at 61 (E.D. Pa. 1983); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d at 858, 176 Cal. Rptr. at 884-85.

[100]*See* Letter from the Ministry of Justice to the Ministry of Foreign Affairs annexed to the Brief of the Republic of France as Amicus Curiae.

litigants to seek information or documents of a technical or commercial nature through the Convention's procedures.[101]

Additionally, respondents could obtain the information they seek by proceeding under Chapter II of the Convention and utilizing a consular official or private commissioner to take evidence. These methods can be utilized to obtain the production and inspection of documents as well as depositions or answers to written interrogatories. Where a party employs them, the question of whether a French court might refuse to execute a request never arises.

Although France (like most other parties to the Convention) has not declared that it will use compulsion to assist a consular official or commissioner authorized to take evidence under Chapter II, there is nothing in the present record to suggest that such compulsion would be necessary. Petitioners have cooperated with other U.S. litigants who have sought evidence using Chapter II methods and expect that they would cooperate here with any reasonable request to employ these procedures. Moreover, the Convention contemplates that courts of the requesting State determine on the basis of their own domestic law whether drawing adverse inferences or imposing sanctions against a party who refuses to cooperate in such voluntary procedures would be appropriate.[102]

There is nothing of record showing that use of the Convention's procedures here would be fruitless or unduly burdensome. Neither the convenience of the local bar nor speculation that use of the Convention might result in delays is a sufficient reason in a comity analysis to decline enforcement of the treaty. Courts can expect to encounter such claims in every case where the Convention is involved. Thus, to rely on them alone would be to decide that comity considerations virtually never mandate the Convention's use.

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[101]*See, e.g., Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686 (1984).

[102]*See* note 35, *supra* and accompanying text.

C. Lower Courts Need Clear Guidance On the Convention's Use Which the Principle of Comity Alone Does Not Provide

Assuming that comity considerations must be weighed in determining whether the Convention should be used, this weighing and balancing should be done primarily by the Court in the formulation of a general rule. Allowing lower courts to decide on a case-by-case basis whether to employ the Convention without clear rules for guidance makes the outcome of individual cases too uncertain and tends generally to relegate the Convention to disuse. This is the practical consequence of the generalized comity analysis which the Solicitor General has commended to the Court.

There are strong practical reasons why the principle of comity cannot serve as a substitute for a clear general rule concerning the Convention's use. Application of the principle of international comity concerns the "exercise of judicial self-restraint in furtherance of policy considerations which transcend individual lawsuits." *Volkswagenwerk A.G. v. Superior Court*, 123 Cal.App.3d at 857, 176 Cal.Rptr. at 884. Trial courts are not well suited to evaluating the full range of such policy considerations, and private litigants are often not well situated to prove them. For example, section 403 of the new Restatement includes a non-exhaustive list of eight factors relevant to such an analysis.[103] This list includes "the importance of the regulation in question to the international

[103]Section 403(2) states:

> Whether the exercise of jurisdiction is reasonable or unreasonable is judged by evaluating all the relevant factors, including, where appropriate,
>
> (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
>
> (b) the connections, such as nationality, residence, or economic acitivity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which

political, legal or economic system," and "the extent to which another state may have an interest in regulating the activity." While the Justice Department and foreign governments can assist the courts to some extent with questions such as these by filing briefs as amicus curiae, it cannot reasonably be expected that the courts will receive such assistance every time a question of the Convention's use or applicability arises.[104]

Generally, foreign governments participate in U.S. legal proceedings as amicus curiae only where they expect the case to establish a rule of broad applicability. This is not a reasonable expectation in the overwhelming majority of discovery disputes which nonetheless affect material interests of foreign sovereigns, as well as interests of the international commercial system. Thus, leaving the lower courts to decide whether to require use of the Convention on a case-by-case basis presents a serious risk that these interests will be neglected.

In the absence of a clear rule requiring the Convention's use, a trial court is often swayed by the immediacy of the discovery

> other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation in question;
>
> (e) the importance of the regulation in question to the international political, legal or economic system;
>
> (f) the extent to which such regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by other states.

[104]Given the substantial burden and expense of participating in a case as amicus curiae, foreign governments cannot be expected to undertake such participation in U.S. litigation routinely. Moreover, even where a case touches on very important interests of a foreign sovereign, there is a substantial risk that the foreign government will not learn of the proceeding or discover the case's potential impact on its sovereignty in time to participate as amicus.

demands made by the litigant standing before it.[105] There is a tendency to dismiss countervailing considerations as merely abstract or hypothetical questions of sovereignty.[106] Moreover, because the question of whether to require adherence to Convention procedures generally arises in discovery, courts are often called upon to balance comity considerations on the basis of a scanty factual record. This is particularly true in cases arising before any attempt to utilize the Convention's procedures, since the courts can only speculate as to the possible results of the Convention's use, as well as any delay, expense or inconvenience that might be

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[105]One commentator has described the attitude of the lower courts as follows:

> Committed to the value of the convenience of the plaintiff (particularly in tort actions), not to mention that of the local bar, a court asserts in personam jurisdiction on the basis of "minimum contacts," regardless of whether the defendant is from Rome, Italy or from Rome, Georgia. The court then orders depositions of the defendant's employees in Geneva, Switzerland as if they were in Geneva, New York and the inspection of documents or equipment located in Hanover, West Germany as if they were in Hanover, New Hampshire. The court normally faces the implications of what it is doing only when it comes up against a foreign criminal statute, and even then asserts the power to override foreign laws by ordering parties "before the court" to attempt in good faith to persuade foreign governments not to enforce their laws that interfere with United States discovery practices. [Oxman, 37 U.Miami L.Rev. at 741-42 (footnotes omitted).]

[106]*See, e.g., Murphy v. Reifenhauser K.G. Maschinenfabrik*, 101 F.R.D. 360, 363 (D. Vt. 1984); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 450 (S.D.N.Y. 1984).

involved.[107] The result is often findings that are conclusory and result-oriented.[108]

There can be little appellate control of a case-by-case approach to comity because trial court rulings on discovery matters are reviewable before judgment only by extraordinary writ, and such review is by its nature difficult to obtain.[109] Clear guidance is needed in the present case to prevent the trial courts' institutional bias towards familiar domestic procedures from becoming de facto judicial abrogation of the treaty. *See Trans World Airways v. Franklin Mint Corp.*, 466 U.S. 743 (1984).

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[107]*See Work v Bier*, 106 F.R.D. 45, 55 (D.D.C. 1985) (in which the court refused enforcement of the Convention, apparently relying solely on a law review article to conclude: "It is obvious that [the Convention's] procedure for the gathering of evidence . . . will be highly ineffectual . . . ."); *Graco v. Kremlin Inc.*, 101 F.R.D. 503, 511 (N.D. Ill. 1984) ("On the record before the court, there is great uncertainty as to the scope of discovery that Graco may obtain through a Letter of Request to France").

[108]*See e.g., Graco v. Kremlin, Inc.*, 101 F.R.D. at 521 ("discovery does not 'take place within [a state's] borders' merely because documents to be produced somewhere else are located there."); *Murphy v. Reifenhauser K.G. Maschinenfabrik*, 101 F.R.D. at 363 (comity "does not require plaintiff to proceed first under the Convention in this case, particularly at this relatively late stage of discovery, and particularly where it appears that a request for production of documents under the Convention would be futile"); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227, 1229 (E.D. Pa. 1983) (denying protective order on finding that it was "not clear that compliance with the plaintiffs' discovery request [would] require a violation of German law or impinge upon the sovereignty of the Federal Republic of Germany").

[109]*Boreri v. Fiat S.P.A.*, 763 F.2d 17, 20 (1st Cir. 1985) (refusing to address merits of mandamus petition raising question of interplay between Hague Evidence Convention and Federal Rules of Civil Procedure).

CONCLUSION

The Hague Evidence Convention is applicable to the discovery at issue in this case, and use of the Convention's procedures should be required. Accordingly, the judgment of the court of appeals should be vacated and the case remanded to the trial court with instructions mandating use of the Convention.

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